BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SAAD AL SAGER	)	
Claimant	)	
	)	
VS.	)	
	)	
DELIVERY LOGISTICS, INC.	)	
Respondent	)	Docket No. **1,043,908**
	)	
AND	)	
	)	
NATIONAL UNION FIRE INSURANCE CO.	)	
OF PITTSBURGH, PA	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the October 11, 2012, Award by Administrative Law Judge (ALJ) Steven J. Howard. The Board heard oral argument on February 6, 2013.

APPEARANCES

John R. Stanley of Overland Park, Kansas, appeared for claimant. John B. Rathmel of Merriam, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the entire record and adopts the stipulations listed in the Award.

ISSUES

The ALJ found when claimant's accidental injury occurred he was an independent contractor, not an employee. Judge Howard also found claimant was precluded by the doctrine of equitable estoppel from receiving any benefits under the Kansas Workers Compensation Act (Act).

Claimant maintains the ALJ erred in finding claimant was an independent contractor and in applying equitable estoppel. Respondent contends the Award should be affirmed.

The issues the Board is requested to consider are:

(1) Was claimant an employee of respondent or an independent contractor?

(2) Was claimant equitably estopped from receiving workers compensation benefits?

(3) What is the nature and extent of claimant's disability, including his entitlement to work disability?

FINDINGS OF FACT

Having reviewed the entire evidentiary record, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings:

Saad Al Sager arrived in the United States in 1997 at age 27. He became a citizen of this country in 2003. Claimant's native language is Arabic, but he testified he understood "some"[1] English.

In July 2008 claimant was hired by respondent as a truck driver and he was assigned a route by respondent. The job required claimant to deliver items to locations designated by respondent. He was directed by respondent to make the deliveries within specific deadlines. Claimant had two days of training before he commenced his duties as a driver. Claimant was advised he would work 5 days a week and earn $700 weekly.[2]

Claimant was hired by respondent through another company, Contractor Management Services (CMS). Before he commenced work for respondent, claimant signed a number of documents evidently provided to him by both CMS and respondent on or about July 28, 2008. The documents repeatedly refer to claimant as an independent contractor, not an employee. Claimant testified:

> Q. And did -- that first meeting did you sign some papers? Did you sign documents, papers? Do you remember putting your signature -- your hand and signing -- signing papers? This is an Independent Service Area Contract. Do you remember signing that?
>
> A. I do not remember.
>
> Q. Okay. Is that your signature there on the last page?
>
> A. Yes. Yes. Yes.

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[1] P.H. Trans. at 6.

[2] There is also evidence in the record indicating claimant was paid $139.75 per day. P.H. Trans., Resp. Ex. A at 9, 11.

Q. Okay. And this is the Independent Service Area Contract; is that right?

A. Yes.[3]

Claimant also signed a "Contractor Management Services Welcome Page."

Claimant testified he signed the documents but did not read them. The documents were not explained to claimant. Other than an application form, which claimant was allowed to take home to complete, claimant was simply handed the other documents with the instruction to "[s]ign here."[4] He did not know the difference between an employee and an independent contractor when he signed the documents. Claimant testified:

> Q. Okay. Were you told that you needed to sign these documents in order to have a job?
>
> A. Yes.[5]

Claimant had never owned or operated his own business. He had no employees.

The Board previously reviewed this claim on appeal from of a preliminary hearing Order. That review resulted in an Order dated August 28, 2009, authored by former Board Member Julie A.N. Sample. The prior Board Order discusses some of the documents claimant signed:

> One of these forms requires the applicants (including claimant) to copy three separate statements on a sheet of paper. They are as follows:
>
> I [Saad] have read the agreement and wish to provide services as an independent contractor to companies I am referred to by CMS.
>
> I am not an employee or agent of CMS or any company I am referred to by CMS, and agree that, as an independent contractor, I am not entitled to either workers' compensation or unemployment compensation benefits.
>
> I am self-employed and I am responsible for my own taxes.[6]

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[3] P.H. Trans. at 18.

[4] R.H. Trans. at 10.

[5] P.H. Trans. at 20.

[6] *Id.*, Resp. Ex. A at 6.

A document entitled "Membership Application and Agreement" was signed by claimant and purported to allow either party to terminate the agreement at will, but the instrument limited claimant's ability to perform those same services for other companies. Another document was in the nature of an employee handbook or guidelines that contained directives regarding performance issues, timeliness and the completion of required paperwork.

On December 9, 2008, claimant was working on respondent's dock, pushing a box from his truck to the dock, when he slipped and fell. One of claimant's legs was positioned between the truck and the dock. The other leg was still on the truck. Claimant injured his low back and left elbow. He sustained contusions to the right elbow and head. He reported the accident by leaving a message for his supervisor.

An ambulance was summoned that transported claimant to the emergency room (ER) at North Kansas City Hospital. The ER physician prescribed medication, physical therapy and took claimant off work. Claimant last worked for respondent on December 9, 2008. Respondent did not accommodate claimant's work restrictions.

Respondent required claimant, when on duty, to wear a badge setting forth claimant's name and "Delivery Logistics." Claimant talked by cell phone to his supervisor, "John," before claimant arrived at the ER. The supervisor directed claimant to "Leave the badge in the truck."[7]

Claimant testified he continued to experience back pain and symptoms in his right elbow. In claimant's estimation, he cannot lift anything greater than 10 pounds.

Claimant testified he was employed by respondent to transport goods by truck to respondent's customers. Respondent provided claimant with a specific route and directed claimant to deliver goods within strict deadlines. Delivery Logistics provided claimant a truck owned by it. Respondent paid for fuel, maintenance, and insurance. Claimant was not allowed to use the truck for personal reasons and was not allowed to take the vehicle home.

Claimant was instructed to park respondent's truck in a designated space in a specific parking lot with the other company trucks. Claimant testified the truck displayed the words "Delivery Logistics" and its telephone number.

John Whitsitt, respondent's regional operations manager, testified that claimant could use his truck to deliver goods for other companies. Delivery Logistics coordinated the delivery of packages for its customers by contracting with drivers. Mr. Whitsitt testified that claimant was paid through CMS.

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[7] *Id.* at 15.

When his work for respondent commenced claimant elected an option to pay premiums for an occupational accident insurance policy apparently issued by Continental American Insurance Company that would pay for medical expenses and weekly benefits if claimant were injured on the job. Claimant received benefits under that insurance policy after the accidental injury. The benefits covered a two-week period and totaled approximately $485. Claimant believed the benefits were workers compensation benefits. It was respondent, not claimant, who made a claim against the occupational accident policy.

Mr. Whitsitt testified claimant should have signed a written lease agreement for respondent's truck, but no lease was executed.

Dr. P. Brent Koprivica examined claimant at the request of his counsel on May 18, 2009. The doctor took a history, reviewed medical records, and performed a physical examination. Dr. Koprivica found claimant had the possibility of a right ulnar contusion with ulnar neurapraxia. The doctor recommended radiographic and electrodiagnostic studies. With regard to claimant's back pain, Dr. Koprivica recommended an MRI scan of claimant's lumbar spine. Dr. Koprivica opined claimant was not at maximum medical improvement and was temporarily and totally disabled since his termination.

Dr. Koprivica examined claimant a second time, also at his attorney's request, on March 22, 2011. Dr. Koprivica again reviewed claimant's medical records, took a history and performed a physical examination. The doctor opined: "Mr. Al-Sager suffered permanent aggravating injury to the lumbar spine with right-sided L4-L5 disk herniation with the resultant development of a right-sided L5 and/or S1 radiculopathy."[8] Dr. Koprivica determined that claimant had achieved maximum medical improvement.

Based on the AMA *Guides*,[9] Dr. Koprivica found claimant sustained a 25% permanent whole body functional impairment.

Dr. Koprivica imposed these permanent physical restrictions: (1) avoid work activities which require frequent or constant bending, pushing, pulling or twisting at the waist; (2) avoid sustained or awkward postures of the lumbar spine; (3) avoid operating heavy equipment because of the significant jarring and vibration; (4) avoid frequent or constant squatting, crawling or kneeling; (5) avoid climbing; and, (6) avoid frequent lifting or carrying greater than 20 pounds.

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[8] Koprivica Depo., Ex. 2 at 10.

[9] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

Dr. Koprivica reviewed a list of work tasks claimant performed in the 15-year period before the accidental injury. The task list was prepared by vocational consultant, Terry Cordray. Dr. Koprivica concluded claimant could no longer perform 17 of the 21 tasks for an 81% task loss.

On July 26, 2011, the ALJ ordered a medical examination to be performed by a neutral physician, Dr. Vito Carabetta. Dr. Carabetta examined claimant on August 31, 2011, and diagnosed a herniated lumbar disk to the right of midline at L4-L5. At the time of Dr. Carabetta's evaluation, claimant was at maximum medical improvement and the doctor imposed permanent restrictions of no lifting greater than 25 pounds occasionally and 10-15 pounds frequently; no bending or stooping activities; and that claimant should change positions frequently.

Based on the AMA *Guides,* Dr. Carabetta found claimant sustained a 10% whole person functional impairment due to the herniated lumbar disk with right radicular symptoms. Dr. Carabetta was not deposed and he expressed no task loss opinion.

Terry Cordray interviewed claimant on September 7, 2011, at the request of his attorney. Mr. Cordray prepared a list of 21 work tasks claimant performed in the 15-year period before his injury. Claimant had the assistance of an interpreter for Mr. Cordray's vocational assessment.

The only medical and vocational testimony in the record is from Dr. Koprivica and Mr. Cordray.

An interpreter was utilized at the regular hearing, but evidently not at the preliminary hearing. No interpreter was present when claimant was examined by Dr. Koprivica, but claimant asserted a friend of his was present and assisted claimant in communicating with Dr. Koprivica. Dr. Koprivica's narrative report dated March 22, 2011, makes reference to the difficulties he had communicating with claimant.[10] An Arabic interpreter was present when Dr. Carabetta performed his evaluation.

PRINCIPLES OF LAW

K.S.A. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines burden of proof: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such

[10] Koprivica Depo., Ex. 2 at 6.

party's position on an issue is more probably true than not true on the basis of the whole record."[11]

It is often difficult to determine in a given claim whether a person is an employee or an independent contractor because there are, in many instances, elements pertaining to both relationships that may occur without being determinative of the actual relationship.[12]

There is no absolute rule for determining whether an individual is an independent contractor or an employee.[13] The relationship of the parties depends upon all the facts, and the label that they choose to employ is only one of those facts. The terminology used by the parties is not binding when determining whether an individual is an employee or an independent contractor.[14]

The primary test used by the courts in determining whether the employer-employee relationship exists is whether the employer had the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed, as well as the result that is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control that renders one a servant, rather than an independent contractor.[15]

In addition to the right to control and the right to discharge the worker, other commonly recognized tests of the independent contractor relationship are:

(1) The existence of a contract to perform a piece of work at a fixed price.

(2) The independent nature of the worker's business or distinct calling.

(3) The employment of assistants and the right to supervise their activities.

(4) The worker's obligation to furnish tools, supplies and materials.

(5) The worker's right to control the progress of the work.

(6) The length of time the employee is employed.

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[11] *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

[12] *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

[13] *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984).

[14] *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

[15] *Wallis* at 102 & 103.

(7) Whether the worker is paid by time or by job.

(8) Whether the work is part of the regular business of the employer.[16]

In *Marley*[17], it was noted:

> . . . Equitable estoppel is the effect of the voluntary conduct of a person whereby he is precluded, both at law and in equity, from asserting rights against another person relying on such conduct. A party asserting equitable estoppel must show that another party, by its acts, representations, admissions, or silence when it had a duty to speak, induced it to believe certain facts existed. It must also show it rightfully relied and acted upon such belief and would now be prejudiced if the other party were permitted to deny the existence of such facts. . . . (*United American State Bank & Trust Co. v. Wild West Chrysler Plymouth, Inc*., 221 Kan. 523, 527, 561 P.2d 792 [1977].

The Act recognizes two different classes of permanent injuries which do not result in death or total disability. An injured employee may suffer a permanent disability to a scheduled body part or a permanent general bodily disability.[18]

There is no dispute that claimant's injury was not a scheduled injury under K.S.A. 44-510d. Accordingly, any entitlement claimant may have to PPD is governed by K.S.A. 44-510e(a) which states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained

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[16] *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

[17] *Marley v. M. Bruenger & Co., Inc.*, 27 Kan. App. 2d 501, 504, 6 P.3d 421, *rev. denied* 269 Kan. 933 (2000).

[18] K.S.A. 44-510d; K.S.A. 44-510e.

> therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

Under K.S.A. 44-510e(a), PPD may be calculated in two ways: (1) based on a statutorily defined work disability or (2) based on an overall functional impairment. Claimant receives the greater of the two.[19]

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[20] It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of claimant and any other testimony relevant to the issue of disability. The trier of fact must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.[21]

K.A.R. 51-21-1 provides that a "worker, under the act, cannot contract with the employer to relieve the latter of liability in case of an accident."

ANALYSIS

(1) Employer/Employee Relationship

The Board adopts the findings of former Board Member Julie Sample on this issue. Judge Sample's prior Order states:

> Although respondent obviously took steps to ensure that claimant would be viewed an independent contractor (thus negating respondent's responsibility for workers compensation coverage) the facts belie the parties' true relationship. Claimant was hired as a truck driver to drive a route for respondent. He was not told the route to take, only that he had to be on time in the delivery of the packages. He was paid a flat rate of $700 per week. He was provided with a truck which was paid for by respondent. Respondent provided gas and insurance and took care of the maintenance on the truck. While it is true that respondent intended for claimant to lease this truck, that endeavor never came to pass. The fact is that respondent provided the truck claimant used in his daily route, paid for all the expenses associated with that truck and limited claimant's ability to use the truck for other deliveries or obtain a substitute driver in the event he could not drive the route

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[19] *Stephen v. Phillips County*, 38 Kan. App. 2d 988, 174 P.3d 452, *rev. denied* 286 Kan. 1186 (2008).

[20] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[21] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 *rev. denied* 249 Kan. 778 (1991).

> himself. Respondent even directed claimant to park the truck in a specific place after there was an issue of vandalism.
>
> While respondent clothes itself in the fabric of a logistic service, it is, in essence, a package delivery company that does not have any drivers. Respondent must then obtain drivers in some fashion and does so through CMS. Claimant was hired, albeit through an intermediary, to perform those driving services. He was assigned a route, by respondent. He was provided a truck and expenses for that truck were paid for, by respondent. He was dictated to with regard to the time of delivery. While it is true that he was paid a flat rate,[22] that fact alone is not determinative. Nor is the fact that there is an abundance of paperwork that suggests claimant is an independent contractor.

The Board finds the legal relationship between respondent and claimant was not that of principal/independent contractor, but was rather that of employer/employee. The label the parties place on the relationship is not determinative, regardless of whether the label is made once or repeated 50 times.

(2) Estoppel

However, the Board cannot agree claimant was equitably estopped from claiming employee status, thus barring him from receiving benefits under the Act.

In the Board's previous Order, it is apparent that former Board Member Sample found it distasteful to rule in favor of respondent on this issue:

> To be clear, this factual scenario is offensive, in that respondent has taken a multitude of steps to avoid workers compensation coverage while in effect, [it] is a package delivery company with no drivers. It borders on the absurd to think a company can provide a service for which it has no employees to provide that service.

Apparently, Judge Sample and the ALJ felt compelled to find claimant must be equitably estopped from claiming he was an employee due in large part to the opinion of the Kansas Court of Appeals in *Marley*. However, the Board finds there are a number of factual distinctions, enumerated below, between *Marley* and this claim that persuade the Board that equitable estoppel should not be applied in this claim.

We note initially recent decisions by our Kansas Supreme Court which provide guidance regarding the construction and application of the Act. For example, *Bergstrom* instructs:

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[22] Claimant arguably was not paid at a flat rate, but was paid a weekly salary of $700.

> When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction.[23]

The Act provides no specific jurisdiction for the Board to apply equitable remedies such as estoppel, in contrast to the district courts and appellate courts of this state. However, the Board is duty bound to follow precedent of our appellate courts. Since the Court of Appeals in *Marley* applied the doctrine of equitable estoppel in a workers compensation claim, and since that opinion has not been overturned, the Board concludes it must consider the applicability of the doctrine of equitable estoppel.

There are some similarities between this claim and Mr. Marley's claim, not the least of which is both Mr. Marley and Mr. Al-Sager signed documents certifying that they were independent contractors and not employees. But, there are significant differences between this claim and the *Marley* claim which render inappropriate the application of equitable estoppel:

(a) Mr. Marley owned his own tractor whereas Mr. Al-Sager was required to use respondent's truck.

(b) Mr. Marley was in a partnership with his spouse which operated under the name S & J Trucking. Mr. Al-Sager did not operate his own business, nor had he ever done so.

(c) Mr. Marley had been in the trucking business for a number of years, whereas the evidence does not support the notion that claimant had years of experience in the package delivery business.

(d) Both Mr. Marley and Mr. Al-Sager obtained coverage under occupational accident insurance policies. In doing so, both claimants agreed that they were not employees, but were independent contractors. It is also true that both claimants received benefits under such policies. However, Mr. Marley made application for benefits under the policy, whereas Mr. Al-Sager did not. In this claim, respondent made the claim against the occupational accident policy. Also, while Mr. Marley did not reveal he claimed to be an employee until after he had received nearly $40,000 in benefits under the accident policy, Mr. Al-Sager received two weeks of benefits under his policy totaling approximately $485. Mr. Al-Sager did not benefit substantially as did Mr. Marley. Also, Mr. Al-Sager testified he believed he was actually receiving workers compensation benefits.

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[23] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

(e) In *Marley*, the Court of Appeals noted that the case did not involve a wide divergence between the bargaining positions of claimant and respondent. There is unquestionably such a divergence in this claim.

(f) Mr. Marley was paid a percentage of the gross revenue generated for each truckload, whereas Mr. Al-Sager was paid a salary of $700 per week.

(g) Mr. Marley was responsible for repairs, maintenance and fuel. Mr. Al-Sager was responsible for none of those costs.

(h) Respondent's motives in making such elaborate arrangements to make sure claimant would not be considered an employee are likely reflected in the numerous documents prepared by respondent and/or CMS. As noted above, the documents contain a waiver prohibiting claimant from asserting a claim for workers compensation or unemployment benefits.[24] Since respondent operated a delivery service without having to employ any drivers, it thereby avoided all or part of the cost of providing workers compensation insurance.

Arguably, if equitable estoppel is applied in this claim, it should be applied to respondent, thus prohibiting it from asserting claimant was an independent contractor. The respondent knew or should have known that both factually and legally the drivers it hired were employees. Claimant executed the various documents acknowledging, over and over again, he was not an employee, but instead was an independent contractor. The evidence does not establish respondent reasonably relied to its detriment on claimant's representations of the nature of the legal relationship between it and claimant. On the contrary, respondent profited from the mirage it constructed. Respondent saved the cost associated with providing workers compensation insurance coverage, qualifying as a self-insured employer, or taking the other steps an employer can take to satisfy the mandates of the Act.[25] In addition to relieving itself of the cost of providing workers compensation coverage, respondent also saved the cost of providing unemployment compensation for its drivers by having them waive that right in advance. Also, in effect, respondent provided claimant with two options in the event of a work-related injury: either (1) have no remedy other than perhaps civil litigation or, (2) seek benefits under an occupational accident policy, the premiums for which the driver paid himself.

The Board is persuaded that given the substantial factual distinctions between this case and *Marley* the doctrine of equitable estoppel should not be applied under the circumstances of this claim.

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[24] As noted earlier in this Order, waivers of workers compensation liability are ineffective.

[25] See K.S.A. 44-532.

(3) Nature and Extent of Disability

This issue requires no extended discussion.

The only evidence regarding claimant's impairment of function is from Dr. Koprivica (25% to the whole person) and from the neutral examining physician, Dr. Carabetta (10% to the whole person). The Board finds persuasive the opinion of the court-appointed physician, Dr. Carabetta. Accordingly, the Board finds claimant sustained a 10% permanent functional impairment to the whole body.

Claimant's last day of work for respondent was on the date of the accidental injury, December 9, 2008. There is no evidence claimant worked for wages from the date of accident until he commenced employment as a part-time taxi driver in October 2010. Claimant was still working part-time as a taxi driver when he testified at the regular hearing on May 1, 2012. Claimant's undisputed testimony is that he earns approximately $200 per week driving a taxi. Hence from December 9, 2008, until approximately October 1, 2010, claimant experienced a 100% wage loss. On and after October 1, 2010, claimant experienced a 71% wage loss ($200 is 29% of $700).

The only evidence regarding the work tasks claimant performed in the 15-year period before the injury, and the physical requirements associated with each task, comes from Mr. Cordray. The only medical opinion in the record concerning task loss–81%–comes from Dr. Koprivica.

The Board finds claimant is entitled to permanent partial disability benefits (PPD) from December 9, 2008, to October 1, 2010, based on a 90.5% work disability (100% wage loss plus 81% task loss divided by 2 = 90.5%). From October 1, 2010, and thereafter, claimant is entitled to PPD based on a 76% work disability (71% wage loss plus 81% task loss divided by 2 = 76%).

CONCLUSIONS OF LAW

(1) When claimant sustained personal injury by accident on December 9, 2008, there existed between claimant and respondent the relationship of employee and employer.

(2) The doctrine of equitable estoppel should not be applied as a bar to claimant's receipt of benefits under the Act.

(3) Claimant is entitled to receive PPD benefits based on the work disability findings set forth above.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[26] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the Board's decision that the Award of ALJ Steven J. Howard dated October 11, 2012, is reversed.

Claimant is entitled to 94.29 weeks of permanent partial disability compensation at the rate of $466.69 per week or $44,004.20 for a 90.5% work disability followed by permanent partial disability compensation at the rate of $466.69 per week not to exceed $100,000 for a 76% work disability which is due and ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of March, 2013.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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[26] K.S.A. 2008 Supp. 44-555c(k).